1886

ADYAN SING v. QUEEN EMPRESS.

refused to receive the evidence tendered on behalf of the prisoner. We think that he was wrong in doing so. There was no ground on which he could refuse the depositions. Further, we think that if he had refused them rightly, the prisoner should not have been debarred from calling the Assistant Magistrate for examination.

We set aside the conviction and sentence and direct that the prisoner be re-tried.

Let the depositions, if tendered in evidence, be received.

T. A. P. *Conviction set aside.*

PRIVY COUNCIL.

P. C.* 1886 *February* 11, 13, 14, 16.

NAN KARAY PHAW AND OTHERS (PLAINTIFFS) *v.* KO HTAW AH (DEFENDANT).

BY APPEAL.

KO HTAW AH (DEFENDANT) *v.* NAN KARAY PHAW AND OTHERS (PLAINTIFFS).

BY APPEAL.

KO HTAW AH (DEFENDANT) *v.* NAN KARAY PHAW AND OTHERS (PLAINTIFFS).

BY CROSS APPEAL.

[On appeal from the Special Court of British Burmah.]

Account—Set off—Cross appeal.

Of two appeals heard together, the first was brought on the dismissal of a suit, in which the representatives of one, now deceased, of two parties claimed for his estate an account against the other; their suit having been dismissed on failure to prove the contract between the parties; and the second appeal was from a decree between the same parties, for damages for the detention of property which had belonged to the estate of the deceased. In the first, the plaintiffs appealed; and in the second the defendant, who also, by cross appeal, claimed a sum which, as he alleged, would have been found due to him had accounts on both sides been taken in the first of the above suits.

Held, that as the first suit was for an account only, and not for the recovery of money, rendering it at least doubtful whether a set-off could be pleaded in defence; and as, also, no issue had been framed, or even asked for, on the question, it was not open to the defendant to raise it on this cross appeal.

* *Present:* LORD BLACKBURN, LORD MONKSWELL, LORD HOBHOUSE, and SIR R. COUCH.

1886

NAN KARAY PHAW v. KO HTAW AH.

APPEALS and cross appeal consolidated and heard together under orders in Council (5th March and 13th June 1885) from two decrees (28th and 8th August 1883) of the Special Court of British Burmah, reversing in one suit, and confirming in another, decrees of the same date (24th April 1882), made in two suits by the Judge of Moulmein.

Two suits, giving rise to the present appeals and cross appeal, were brought on the 11th March 1881, by the representatives, widow and children, of Phatadah, deceased in 1879, who had been in his lifetime a Karen forester employed in cutting timber in the forests of Upper Burmah, and the owner of elephants used in "ounging" teak timber to the tributaries of the Salwin River to be floated down to Moulmein. The defendant in both suits was Ko Htaw Ah, a Burmese of Moulmein, trading in teak timber. The case alleged was that money having become due to Phatadah, who had sent down timber to Moulmein under contracts with the defendant, payment was refused in 1879; and that Phatadah having died in that year, his elephants and other effects had been unlawfully detained by the defendant through his agent in the forests, Bo Galay.

The first suit, valued at Rs. 2,38,190, was for an account of proceeds of sales of timber alleged to have been sold by the defendant in Moulmein, in which sales Phatadah, who had sent down the timber from the forests, was interested, jointly with the defendant, under two several contracts; the earlier in date of the two having reference to logs cut by Phatadah, and hammer-marked, in the Thoungyeen forest; the later contract having reference to other timber cut by Phatadah, and hammer-marked differently, in another forest, Mai Gnet.

Both these contracts were denied by the defendant, who also denied that he was Phatadah's agent, alleging, on the contrary, that he was his employer, and had largely over-paid him for the work done. He also preferred a counter-claim upon the estate of the deceased to the amount of Rs. 55,360.

The Judge of Moulmein, in the first instance, found that the contracts had been made as alleged, and the timber sent down by Phatadah, who had not been fully paid. He decreed an

1886

NAN KARAY PHAW v. KO HTAW AH.

account in the first suit, issuing a commission under s. 394 of the Civil Procedure Code, 1877.

In the second suit, in which the plaintiffs sued Ko Htaw, the same defendant, and Bo Galay his agent, for the detention of property, the Court of first instance found that the defendant had taken possession of thirty-one elephants that had belonged to Phatadah, the other defendant being merely a servant, and disallowed the defence attempted to be made that this had been done either under a contract or in virtue of a custom in the forests. The value of the elephants, found to be Rs. 43,765, and damages for their detention, Rs. 24,800, were decreed payable to the plaintiffs.

The Special Court of British Burmah (JARDINE and WILKINSON, JJ.) reversed the decree in the first, or timber, suit, finding that the contracts were not proved, and that the plaintiffs were not entitled to an account.

In the second, or elephant, suit, the same Court (J. JARDINE and EGERTON ALLEN, JJ.) affirmed the decree of the lower Court. In giving judgment in the second suit, the Court thus disposed of a question as to the over-payment alleged by the defendant in his defence to the first suit:—

"A contention has been raised that the defendants were entitled to set off the amount they claim as balance due to them by Phatadah. Mr. Vertannes argued that s. 111 of the Code of Civil Procedure gave his client that right. But this section narrows the area which the words of Act VIII of 1859, at first sight, appear to allow to cross claims in the same suit; and clearly, and in express words, allows claims to set off ascertained sums of money, and by implication disallows such claims where the sum has not been ascertained. In the present case there has been no ascertainment, in fact the present plaintiffs brought a separate suit to get an account made; and the present claim to set off is on all fours with those held to be inadmissible in the cases collected by Mr. Broughton under s. 111 of his edition of the Code of Civil Procedure, and Illustration D, on which Mr. Vertannes has relied, does not apply; because the set-off stated in the answers of defendants is not the amount of the promissory notes but the balance said to be due after allowing interest on one

side and payments on the other, other payments in the jungles also coming into the account. The amount demanded by defendant not having been ascertained, we cannot treat it as a cross claim in the present case, which is altogether different in its nature to the suit brought by the same plaintiffs against the defendant for the taking of an account and payment of whatever balance might be found due to them."

The first suit having been dismissed and the second decreed, the plaintiffs on the one side, and the defendant on the other, filed these appeals. After their registration, the defendant, in 1885, applied for special leave to file a cross appeal to be heard at the same time.

This application was granted, Mr. *J. T. Woodroffe* appearing for the petitioner, opposed by Mr. *A. Agabeg*. The principal ground was that the defence in the first suit having alleged the debt of Rs. 55,360 from Phatadah's estate, partly on account of advances made to enable Phatadah to purchase elephants and fell timber, partly on account of money paid in protection of a lien on the timber, and partly in regard to promissory notes alleged to have been made by Phatadah to the amount of Rs. 32,565, it had been made a ground of special appeal to the special Court that the lower Court ought to have fixed an issue as to these liabilities. But the appeal having resulted in the dismissal of the first, or timber, suit, the defendant had, in the second, been held liable to pay more than would have been found due from him had the counter-claim, arising out of these transactions, been considered.

On these appeals,—

Mr. *R. V. Doyne* and Mr. *A. Agabeg* appeared for the representatives of Phatadah.

Mr. *A. Phillips* (with whom was Mr. *A. Scoble, Q.C.*) appeared for Ko Htaw Ah.

For the appellants in the first suit it was argued that the evidence had established the making of the two contracts, and the performance of his part under them by Phatadah, who was entitled to an account of the timber sold. For the same parties, as respondents in the second appeal, it was argued that there

1886

NAN KARAY PHAW v. KO HTAW AH.

was no ground for interfering with the concurrent decisions of the two Courts in Burmah. And for the same, as respondents in the cross appeal, it was argued that there had been no issue fixed on the question now sought to be raised, which should have been the subject of a suit (if any part of the cross-claim was not barred by limitation); moreover, the evidence had not established it.

Mr. *A. Phillips* for Ko Htaw Ah, as respondent in the first suit, contended that the suit had been rightly dismissed, the contracts not having been proved. He argued for the same party as respondent in the second suit that, even assuming that the detention had been correctly found, the damages had not. For him also, as cross appellant, the contention was that for all the timber which arrived he had credited Phatadah, against whom there would have resulted a debit on the taking of a general account. And this counter-claim, if not covered by the issue as to what the plaintiffs were entitled to claim, might, at all events, be regarded as a set-off within ss. 111 and 116 of the Code of Civil Procedure. The dismissal of the first suit by the special Court would not prevent the defendant from insisting on this set-off. A defendant, denying a plaintiff's claim, might allege also a set-off, and might obtain a decree for it although the plaintiff did not succeed in establishing any sum to be due to him—*Haiyat Khan* v. *Abdulakhan* (1).

Mr. *R. V. Doyne* replied on the whole case.

On a subsequent day (February 16th) their Lordships' judgment was delivered by

LORD MONKSWELL.—These are two appeals from judgments of the Special Court of British Burmah, in both of which the widow and children of one Phatadah were plaintiffs, and Ko Htaw Ah, a Burmese merchant, was defendant; in the second case an agent of his being joined as a co-defendant with him. In the first case, which may be conveniently called the timber case, the Court of Moulmein gave judgment for the plaintiffs. That judgment was reversed by the Special Court of British Burmah, by which judgment was given for the defendant and the suit dismissed. From this judgment the plaintiff appeals,

(1) 6 Bom. H. C. Rep., 151.

1886

NAN KARAY PHAW v. KO HTAW AH.

and there is a cross appeal by the defendant on the ground that he has a cross claim which makes Phatadah to have been his debtor. In the second case, which may be called the elephant case, both Courts concurred in finding for the plaintiff, and the defendant only appeals.

It will be convenient to deal with the cases separately; but in order to make them intelligible, a short statement is necessary.

On the banks of the Salwin River and its tributaries are extensive forests, partly, it would appear, in the Burmese territory, and partly in the territory of a neighbouring semi-barbarous tribe called the Karens. A large timber trade is carried on in these forests, timber being cut, and as it is called, ounged—that is, dragged or pushed by elephants into the creeks or adjoining rivers and streams, and left to find its way, apparently without assistance, down to Moulmein. Near Moulmein there is a station called Kadoe where the timber is intercepted, chiefly for the purpose of the revenue being collected upon it; and it appears that Burmese merchants, who were in the habit of buying timber from the Karens (the Karens for the most part confining their operations to the forests), or employing the Karens to cut timber for them, and of sending it to float down to Kadoe, used certain marks for its identification, which marks were registered by a Government official at Kadoe. It has not been very distinctly explained what the regulations were under which those marks were registered, but their Lordships collect (what appears to be sufficient for the present purpose) that the existence of the mark of a merchant on timber was sufficient *primâ facie* to constitute some title on his part to it, and also some title of the Government to revenue to be paid by him for it.

The late husband of the plaintiff was a Karen. He seems to have been a leading man among the Karens, to have had some capital and a number of elephants, and before the transaction which forms the subject of this action, to have been in the habit of cutting timber in these forests and of selling it there. He was in no sense a merchant conveying timber from the forests to Moulmein, and he had consequently no registered marks. The defendant is a timber merchant carrying on extensive transactions,

1886

NAN KARAY PHAW v. KO ITAW AH.

having considerable capital, and the lessee of one of the forests in which the timber was felled which formed the subject of the action.

The plaint in the suit states the plaintiff's cause of action clearly and succinctly. She says she is the widow of Phatadah, who died in 1879. "That in or about the year 1871 Phatadah entered into an agreement with the defendant, whereby he was to send to Moulmein timber marked" with the "*pin-byit*" mark—which may be shortly described as three circles with crosses within them—"worked and purchased by him in the Thoungyeen forests, and defendant was, as Phatadah's agent, and for and on his behalf, to dispose of the same and render an account of the proceeds of the sales effected by him. That between July 1871 and January 1879 the defendant received and entered at Kadoe 5,226 logs of timber bearing the said mark, which he disposed of. That subsequently, that is to say about six years ago, the said Phatadah agreed with the defendant to work and send timber down from the Mai Gnet forests to Moulmein, which timber was to be marked by him with the mark "Ko Lan," and that the defendant should sell the same for Phatadah as his agent and account for the proceeds of the sales effected by him. That between November 1879 and July 1880 the defendant received and entered at Kadoe 1,183 logs of timber bearing the said mark, and disposed of the same." The plaint then states that the defendant paid Phatadah Rs. 30,000 on account, but that he has rendered no account of the sales. Then the plaint prays for an account of the sales against the defendant.

The defendant, in his written statement, denies having entered into either of the alleged agreements. He says that the "*pin-byit*" mark is his own, but registered by him in his son's name, and that the timber which came from the Thoungyeen forest was his own, purchased by him there out of his own moneys. He further says that, "with regard to the timber marked Ko Lan (which is the defendant's own registered hammer-mark), defendant begs to state that, in the year 1238, Phatadah, who had for several years previously been working on his own account in the Maipain forests, came to him and asked him to assist

him with some money to buy elephants, and to permit him to work in the Mai Gnet forests. That in accordance with his request defendant lent him Rs. 17,555 on the understanding that he should work for defendant in Mai Gnet forests on the following terms:—Phatadah was to cut and oung with his elephants as much timber as he could, and make it over to defendant in the Salwin River, at the rate of Rs. 17 per log for full-sized logs, and Rs. 5 for under-sized logs, defendant paying the revenue due to the Chief of Zimmay on all timber so delivered. Phatadah was, in accordance with the prevailing custom of foresters working in other people's forests, not to remove his elephants from the Mai Gnet forests as long as he was indebted to the defendant." The plea then states that, in accordance with the above arrangement, Phatadah worked in the defendant's forests until his death, during which time he took several further advances from the defendant; and that, at the time of his death, Phatadah was indebted to defendant in the sum of Rs. 40,234, which, with further payments and interest, amounted to a cross-claim of Rs. 55,360 against the estate of Phatadah.

The evidence was extremely conflicting and unsatisfactory. Their Lordships think that no good purpose would be served by going through it in detail, and it will be enough to indicate some of its leading features. The plaintiff, the widow, speaks of the original contract in these terms. After saying that her husband was a head man among the Karens, she says: "I know the defendant; he came to my house at May Too village 12 years ago. He entered into an arrangement with my husband as follows: 'Let us form friendship and drink each other's blood.'" It seems that there is a custom among the Karens, if they make a solemn contract, for each party to drink the blood of the other. "The defendant told the deceased to cut down timber and send it to Moulmein, and he, that is defendant, would sell it. Defendant said,—'friend, this is your mark' (exhibit A., a marked hammer, identified). Defendant produced this and gave it to Phatadah. My husband worked timber after defendant went up for five years at Thoungyeen. He came down to Tsin-yo." Then she says: "After arrival at Tsin-yo I came with my husband

1886

NAN KARAY PHAW v. KO HTAW AH.

to Kaw Nhat, where defendant was residing, to ask for the price of the 6,000 logs of timber sent down from Thoungyeen." It is represented by this lady and several of the witnesses that Phatadah sent down as many as 6,000 logs of timber from Thoungyeen. Then she says: "The defendant said 'friend, do not be alarmed about the money; keep it here until you build a substantial house.'" Then she speaks of the second contract about working timber at Mai Gnet. "My husband said he was getting old and could not do it. Defendant said: 'You are acquainted with the Karens, and if you work timber can be obtained.' Phatadah was to send down the timber; defendant was to sell it and pay him. I was present and heard this. My husband was present and went up to the Mai Gnet forests. He never got any money from defendant," and so on. She also says in her evidence that Phatadah was to become security, with the other Karens, for the defendant; and that that was the consideration on which the defendant agreed to act for him. She says, subsequently, in respect of the second contract: "The defendant agreed to sell Phatadah's timber at the second agreement out of gratitude, as he had stood security for him." She calls four coolies, all of whom declare themselves to have been present on this occasion, and to have witnessed the drinking of the blood, and all of whom speak in substance, though somewhat vaguely, of the transaction, namely, that Phatadah was to cut timber and send it down, and that the defendant was to sell it for him in consideration of friendship, and of his having gone security for him with certain Karens. It may be observed that there is no proof in the case of his having "gone security," whatever that expression may mean.

It may be observed here that, according to this lady's evidence, herself and a number of her witnesses were entertained by a person of the name of Ma Bwin, a rich lady, who seems to have maintained the suit, the defendant suggests out of ill-will to him on account of his having obtained possession of a forest which she wanted; and there also seems to have been some written agreement between the widow and her witnesses that, in the event of her succeeding in establishing her case, they were all to receive something.

1836

NAN KARAY PHAW v. KO HTAW AH.

The coolies also speak of Phatadah having, during five or six years, sent down as many as 1,000 logs a year; so that, on the whole, some 6,000 logs of timber were sent down, according to their account, from the Thoungyeen forest to Kadoe, to be sold for the plaintiff by the defendant. There is also some further evidence to the effect that Phatadah bought some logs of timber, about 500, and that he put, or caused to be put, his "*pin-byit*" marks upon some timber which he sent down; further that he demanded payment of defendant and was put off with excuses. Further, the hammer which is said to have been delivered to him by the defendant is put in, by which it appears that, although the circles remained, the crosses had been, in a great measure, intentionally defaced; that is, in substance, the case of the plaintiff.

The defendant denies the contracts. He admits that he received a large number of logs amounting to 5,000 in round numbers, at Kadoe, some bearing the "*pin-byit*" mark and others bearing the mark of the circles without the crosses, *i.e.*, the "*pin*" mark only, and he accounts for it in this way. He says that he made an agreement in 1870 or 1871 with one Tsit Paw, a Karen (who is dead), to buy of him 3,500 logs, and that he put this circle and cross mark upon all of those. He further says that, upon the conclusion of his transaction with Tsit Paw, he bought a number of other logs, some 1,500, and afterwards some more, from Ko Nan Gay; and that, in order to prevent confusion between his purchases from Tsit Paw and his purchases from Ko Nan Gay, he caused the crosses on all the hammers he had (he appears to have had several) to be obliterated; so that, according to his story, there ought to have arrived from Tsit Paw some 3,500 logs with the "*pin-byit*" mark and Tsit Paw's mark; and there ought to have arrived from Ko Nan Gay, who had no mark of his own, a certain number with the pin mark without the cross. This is what happened. It seems from the record which is kept at Kadoe that 3,318 logs with the "*pin-byit*" mark and Tsit Paw's mark arrived in the course of two or three years, which certainly is confirmatory of the defendant's story, as far as it goes, and 1,607, or somewhere about that number, came with the plain pin mark, together with some

1886

NAN KARAY PHAW v. KO HTAW AH.

other marks which, though Ko Nan Gay had no mark of his own, might have been impressed upon them by persons with whom he dealt. This is also confirmatory of defendant's story. He goes on to say that, with respect to the subsequent alleged agreement in 1876, the forest of Mai Gnet was his own, and he puts in his lease. He insists that it is highly improbable that he should have given Phatadah his own timber and consented only to act as agent for him. He says that what he really did was to employ Phatadah to cut and oung timber for him in his own Mai Gnet forest; and that he made him a considerable advance—some Rs. 17,000 odd—for the purpose of enabling him to do all that was necessary for that purpose. It should be said that, with regard to the former alleged contract, having reference to the Thoungyeen forest, he said that he did employ Phatadah to oung four thousand logs at eight annas a log; he further says, with respect to the Mai Gnet forest, that he made subsequent advances, and that he got promissory notes for them. He maintains that Phatadah was largely in his debt.

The first question is whether the plaintiff has proved her case. In the first place, we have to deal with a supposed contract made 12 years before the trial, entirely by word of mouth, and on which the evidence is that of the plaintiff herself and the coolies—evidence of a very loose description, which appears to their Lordships not satisfactory. Further, the contract alleged bears a great deal of improbability on the face of it. Phatadah was a Karen with some, but not a large, capital. Before this transaction, he had confined his dealings to cutting and selling timber in the forests. It does not seem very probable that he should have entered upon transactions of the magnitude alleged, whereby he sent down some 6,000 logs, the price of which would far exceed a lac of rupees. Again it seems improbable that the defendant, a merchant, and a considerable capitalist, should have consented to reverse positions with Phatadah, to make Phatadah the principal and himself the agent, and to agree to account to Phatadah. That becomes still more improbable when we consider that he is alleged to have done this without any commission such as would ordinarily be given on the sale of timber, but simply out of friendship—

signified by the drinking of blood—and a supposed promise to become security which was not proved to have been performed.

It appears therefore to their Lordships, without going more in detail into the evidence, that on the whole the two contracts alleged by the plaintiff—the first as to the Thoungyeen forest, and the second as to the Mai Gnet forest—are not sufficiently proved. They regard the account which the defendant gives of the transactions the more probable; and they may further observe that the production by the plaintiff of the marked hammer, on which a great deal of reliance has been placed, seems to bear against her. The defendant states that he obliterated the crosses, and why he did so; the hammer is shown, and the crosses appear to be obliterated so far that, though traces of them remain, they would not be sufficient to impress the cross mark upon timber. That would indicate that the hammer must have been in the possession of the defendant for some time, and does not accord with the case of the plaintiff that Phatadah continued in possession of it from the time of receiving it. The obliteration of the crosses agrees with the defendant's account, and disagrees with that of the plaintiff, who appears to have had no knowledge of the obliteration, and whose case is that all the timber which was sent down was marked with the full mark of the circles and the crosses, and with no other. On these grounds it appears to their Lordships that the Court of Appeal was right in holding that the plaintiff had not proved her case.

With respect to the cross claim on the part of the defendant, the first question which arises is whether it is admissible under the pleadings. The claim is not for the recovery of money, but for an account, and it is, at all events, doubtful whether a set-off could be pleaded in answer to such a claim. It must further be observed that no issue was framed or even applied for on this question. It appears to their Lordships, therefore, that it is not open to the defendant to raise it. That being so, it is not necessary to go into the question of whether the alleged promissory notes are or are not genuine. Their Lordships, however, cannot help observing that the evidence of the cross claim is highly unsatisfactory.

For these reasons their Lordships will humbly advise Her

1886

NAN KARAY PHAW v. KO HTAW AH.

Majesty in this case that the judgment of the Special Court of British Burmah be affirmed, and that both appeals, the plaintiff's appeal and the cross appeal, be dismissed. The appeal will be dismissed with costs; and the cross appeal without costs, save those which were incurred by Nan Karay Phaw in opposing the petition for special leave to enter a cross appeal.

The second suit is a suit by the widow for the purpose of obtaining, as against the defendant, certain elephants of Phatadah which he has detained, or the price of those elephants; and further for damages for the detention and use of those elephants by the defendant for two years. The defendant seeks to justify the detention of the elephants on the double ground, first of a contract with Phatadah, by which he was entitled to detain them, and secondly of a custom of the forest. Both these contentions are negatived by both Courts, and being questions of fact, must be treated as decided. The amount of damages on which a question was raised falls under the same rule. No set-off has been pleaded in this case. The judgment therefore of the Special Court will be affirmed, and the appeal dismissed with costs, and their Lordships will humbly advise Her Majesty to this effect.

Appeals dismissed.

Solicitors for the appellants in the first suit, respondents in the second, and cross-respondents: Messrs. *Bramall & White.*

Solicitors for the respondent in the first suit, appellant in the second, and cross-appellant: Messrs. *Sanderson & Holland.*

C. B.

P. C. * 1886 *March* 17, 30.

JADULAL MULLICK (DEFENDANT) *v.* GOPALCHANDRA MUKERJI AND ANOTHER (PLAINTIFFS).

[On appeal from the High Court at Calcutta.]

Right of way—User of twenty years to support servitude—Extent and mode of user—Calcutta Municipal Act (Bengal Act IV of 1876).

As establishing his right of way over the defendant's passage, the plaintiff relied upon a user of it, several times in the year, for twenty years prior to the defendant's interruption of it, by mehters for the purpose of removing the contents of a cess-pool connected with a privy belonging to the plaintiffs' house.

* *Present*: LORD BLACKBURN, LORD HOBHOUSE and SIR R. COUCH.